

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP273

Cir. Ct. No. 2014CV6804

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

200 BROADWAY LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRASH, J. 200 Broadway, LLC, appeals an order of the trial court granting summary judgment in favor of the City of Milwaukee on 200 Broadway's claim for damages for lost profits. The claim was the result of the City informing 200 Broadway that it would be in violation of a City ordinance if it utilized its

property as a parking lot during Summerfest in June and July of 2013. 200 Broadway argues that existing Wisconsin law is not clear as to whether an alleged violation of a City ordinance can preclude a business from recovering lost profits, and therefore summary judgment was not appropriate. 200 Broadway further contends that there are disputed material facts that mandate reversal of the summary judgment order.

¶2 In contrast, the City contends that there is good, albeit old, case law that prohibits the award of damages for lost profits from an unlawful business. The trial court agreed, and granted summary judgment in favor of the City. We affirm.

BACKGROUND

¶3 200 Broadway is the owner of property located at 114-114ADJ North Jefferson Street, Milwaukee, Wisconsin (the Property). Peter Renner is the managing member of 200 Broadway. The Property, a vacant parcel, was purchased in or around April 2013 for the purpose of providing parking for visitors of tenants that occupy a nearby building owned by one of Renner's other real estate companies. Additionally, the Property is adjacent to the Henry W. Maier Festival Park, where many festivals are held during the summer, including Summerfest; as such, it was ideal for festival parking, and Renner intended to offer Summerfest parking on the Property.

¶4 The Milwaukee Code of Ordinances, specifically Chapter 200, *et seq.*, on zoning regulates the "occupancy and use of all buildings, structures and premises" in the City of Milwaukee. MILWAUKEE, WIS., CODE OF ORDINANCES § 200-002 (1986). The Property is zoned Industrial-Mixed, which limits the use of the Property for parking unless it meets certain standards; otherwise, use as a

parking lot would be allowed only upon the issuance of a special permit. *Id.*, § 295-803.1.b. Because the Property is a corner lot, its use as a parking lot is prohibited without a special use permit. *Id.*, § 295-803.2.s-4.

¶5 On the morning of June 26, 2013, the first day of Summerfest that year, Captain Stephen Basting of the Milwaukee Police Department (MPD) requested that Assistant City Attorney Jay Unora go on a “ride-along” with him. Basting had discovered that the Property was going to be used that night for Summerfest parking and was concerned about the traffic flow in the area. Unora, in his capacity as an assistant city attorney, handles cases for the Department of Neighborhood Services (DNS).

¶6 That same morning, three or four representatives of the City of Milwaukee approached the employees of Renner who were working at the Property. Those City officials told the employees to stop work immediately. The employees referred the officials to Renner.

¶7 Later that day, when an employee of Renner attempted to open the Property for Summerfest parking, MPD officers arrived at the Property and told the employee that the Property could not be used for parking because there had been an “order” issued prohibiting parking on the Property. The employee called Renner, who then went to the Property.

¶8 Basting and Unora also arrived at the Property during this exchange. After speaking with Unora, Basting told Renner that he did not believe that this was a police matter. Renner then spoke with Unora. Unora, after going on the ride-along to the Property earlier in the day, had researched the issue of whether there had been any permits issued or variances granted that would allow the Property to be used as a parking lot, and found none. Consequently, Unora

informed Renner that he would be in violation of the Milwaukee Code of Ordinances if he used the Property as a parking lot, and could be issued citations in the amount of \$1267.00 for each car parked there per night. Based on that information, Renner instructed his employees not to open the Property for parking until this matter was resolved.

¶9 Subsequently, Renner confirmed that the Italian Community Center, the former owner of the Property, had previously used the Property as a parking lot without having been granted a variance. Renner also learned from Art Dahlberg, the city commissioner for DNS at the time, that other vacant lots in the vicinity of the Property were used as parking lots during Summerfest without having been issued any special permits, and without interference from the City.

¶10 On July 1, 2013, Renner was contacted by Basting, who informed him that the objections to Renner using the Property for parking during Summerfest had been rescinded, and he was free to use the Property for parking for the remainder of the festival. The Property was then used for parking for the remaining days of Summerfest.

¶11 200 Broadway filed suit against the City in August 2014, claiming that the City's interference with its use of the Property as a parking lot had resulted in a loss of parking revenue for five days, alleging damages exceeding \$10,000.00. The City filed a motion for summary judgment in August 2015, asserting that 200 Broadway's use of the Property as a parking lot was an unlawful activity for which damages for lost profits may not be awarded. 200 Broadway countered that the current state of the law on this issue is not clear, in that the City relied on case law from over 100 years ago upon which the application to these facts is questionable, and therefore summary judgment was not appropriate.

¶12 In a written decision issued November 6, 2015, the trial court agreed with the City and granted its motion for summary judgment. This appeal follows.

DISCUSSION

¶13 This court reviews a trial court's decision to grant summary judgment independently, applying the same methodology. *Kohn v. Darlington Cnty. Sch.*, 2005 WI 99, ¶11, 283 Wis. 2d 1, 698 N.W.2d 794. Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2) (2015-16).¹ In determining whether summary judgment was “appropriately granted,” this court will review the summary judgment materials “in the light most favorable to the nonmoving party.” *Kohn*, 283 Wis. 2d 1, ¶11 (citation omitted).

¶14 200 Broadway’s first argument is that the law on this issue is not clear. The primary case law that forms the basis of the City’s argument, and that was relied on by the trial court in its granting of summary judgment, is a century-old case, *Raynor v. Blatz Brewing Co.*, 100 Wis. 414, 76 N.W. 343 (1898). In *Raynor*, Blatz owned a building that was condemned, and had it razed subsequent to the condemnation; however, the building housed a theatre that Blatz had leased to Raynor. *Id.* at 415-16. Raynor sued Blatz for lost profits that he would have earned had Blatz maintained the building until the end of his lease. *Id.* at 415. Raynor prevailed and was awarded damages for lost profits, the calculation of

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

which included anticipated profits that would have been earned on Sundays as well as other days during the week. *Id.* at 416-17. However, at that time the “Sunday law” was in effect, which prohibited business owners from conducting “any manner of labor, business or work, except only works of necessity and charity” on Sundays. *Stark v. Backus*, 140 Wis. 557, 563, 123 N.W. 98 (1909) (quoting WIS. STAT. § 4595 (1898)). This was a criminal statute, and violators of the law were punished by fine. *Id.* at 561-63.

¶15 Our supreme court found that the anticipated profits from Sundays should not have been included in the calculation for lost profits. *Raynor*, 100 Wis. at 420. It concluded that “the profits made on Sundays, resulting from a criminal violation of the Sunday law, cannot form any legal basis for the estimate of damages.” *Id.* The supreme court subsequently confirmed this holding in *Kremsreiter v. Boddenhagen*, 169 Wis. 515, 173 N.W. 295 (1919), holding that “[p]rofits made on Sundays from a violation of the Sunday law cannot form any legal basis for the estimate of damages.” *Id.* at 520-21. Relying on *Raynor* and *Kremsreiter*, the City argued, and the trial court agreed, that 200 Broadway is not entitled to damages because use of the Property for parking is prohibited.

¶16 200 Broadway argues that it is unclear whether these cases are applicable to this case because the Sunday law was a criminal violation, where here the “unlawful conduct” of using the Property as a parking lot is merely a municipal violation. We do not find 200 Broadway’s attempt to distinguish a criminal statute violation from a municipal ordinance violation to be persuasive.

¶17 The City responds to this argument with the basic definition of “ordinance,” which is “an authoritative law or decree.” *Ordinance*, BLACK’S LAW DICTIONARY (10th ed. 2014). The dictionary entry explains that “municipal

governments can pass ordinances on matters that the state government allows to be regulated at the local level.” *Id.* Furthermore, although an ordinance may be “purely administrative in nature, establishing offices, prescribing duties, or setting salaries” or having to do with “the routine or procedure of the governing body,” an ordinance may also be:

[A] governmental exercise of the power to control the conduct of the public—establishing rules which must be complied with, or prohibiting certain actions or conduct. In any event it is the determination of the sovereign power of the state as delegated to the municipality. It is a legislative enactment, within its sphere, as much as an act of the state legislature.

Id. (quoting 1 Judith O’Gallagher, *Municipal Ordinances* § 1A.01, at 3 (2d ed. 1998)). In this description, ordinances are compared to statutes enacted by the legislature with no significant differences noted, and without any distinction between a criminal violation and non-criminal conduct. In fact, our supreme court has specifically stated that issuing a building permit that violates a zoning ordinance is unlawful. *See Jelinski v. Eggers*, 34 Wis. 2d 85, 93, 148 N.W.2d 750 (1967) (“Zoning ordinances are enacted for the benefit and welfare of the citizens of a municipality,” and thus when a city revokes an illegal permit “it is exercising its police power to enforce the zoning ordinance for the protection of all citizens who are being injured by the violation ...”).

¶18 Thus, the courts have established that conduct is “unlawful” if it violates any law—municipal ordinance, statute, or other regulation—regardless of whether the underlying conduct is criminal in nature. *See id.*; *see also Cranston v. Bluhm*, 33 Wis. 2d 192, 198, 147 N.W.2d 337 (1967) (a civil conspiracy is unlawful); *Winslow v. Brown*, 125 Wis. 2d 327, 330, 371 N.W.2d 417 (Ct. App. 1985) (operating an automobile on a bicycle trail constitutes an unlawful purpose).

This interpretation is based on the premise that municipal ordinances are enacted for the same overall purposes as state statutes and other laws: the protection of citizens and their property interests. See *Jelinski*, 34 Wis. 2d at 93; *Ordinance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¶19 As a result, we find that *Raynor*’s holding that damages cannot be awarded for profits from an unlawful business is applicable in this case. In fact, *Raynor* unequivocally states that “the profits of an *unlawful* business cannot be any proper basis for the estimate of damages. This would seem to be too clear for argument.” *Raynor*, 100 Wis. at 420 (emphasis added). We agree.

¶20 200 Broadway also argues that there are genuine issues of material fact in dispute in this case that should have precluded summary judgment. The crux of this argument is 200 Broadway’s assessment that the ordinance prohibiting the Property’s use as a parking lot was being selectively enforced by the City. In particular, 200 Broadway contends that the Italian Community Center and other nearby vacant lots used their properties for parking during Summerfest without interference from the City. The trial court found that any disparate treatment of other property owners was irrelevant to 200 Broadway’s use of the Property. We agree.

¶21 In contrast, 200 Broadway argues that evidence of disparate treatment is relevant to its case, citing *Village of Menomonee Falls v. Michelson*, 104 Wis. 2d 137, 311 N.W.2d 658 (Ct. App. 1981). *Michelson* does in fact state that if an ordinance is enforced ““with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights,”” the equal protection clause of the fourteenth amendment is violated. *Id.* at 145 (citation omitted).

Michelson further states that “evidence that a municipality has enforced an ordinance in one instance and not in others would not in itself establish a violation of the equal protection clause.” *Id.* Rather, “[t]here must be a showing of an intentional, systematic and arbitrary discrimination.” *Id.* After citing to **Michelson**, however, 200 Broadway does not develop any argument with regard to an equal protection claim, and we decline to develop one on its behalf. *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

¶22 In any case, 200 Broadway fails to establish the relevance of its selective enforcement argument. In the first place, 200 Broadway was never issued a citation in this matter, so the applicable ordinance was not actually enforced against it. Of course, the absence of a citation does not convert an unlawful activity into a lawful one. *See State ex rel. Smith v. City of Oak Creek*, 139 Wis. 2d 788, 793-94 & 798-99, 407 N.W.2d 901 (1987) (concluding that the City of Oak Creek acted reasonably when it refused to renew a bar owner’s liquor license based on his testimony regarding his past drug dealing, even though he had never been convicted of any drug-related offenses). Indeed, cities are not required to achieve complete enforcement of their ordinances against every offender. *See Hameetman v. City of Chi.*, 776 F.2d 636, 641 (7th Cir. 1985) (“Selective, incomplete enforcement of the law is the norm in this country.”). Accordingly, any facts advanced by 200 Broadway relating to possible selective enforcement relative similar properties in the area are not material to the issue of this case; as a result, they would not be relevant to a summary judgment analysis. *See WIS. STAT. § 802.08(2)*

¶23 Rather, the issue in this case is whether 200 Broadway is entitled to damages for profits that would have been gained from an unlawful use of the Property. The applicable law on this issue, **Raynor**, clearly states that it is not.

There were no disputed material facts with regard to this issue. Therefore, summary judgment was appropriate.

¶24 We acknowledge the City’s position relating to the policy implications of a decision favoring 200 Broadway, such as the possibility that it would encourage illegal business operations, as well as the potentially chilling effects on the City’s ability to enforce its ordinances. However, we do not review these considerations as we have already reached a conclusion based on other factors. *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (“An appellate court should decide cases on the narrowest possible grounds.”).

¶25 Accordingly, we affirm the trial court’s granting of summary judgment in favor of the City of Milwaukee.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

